

**BEFORE THE
REGISTRAR OF CONTRACTORS
CONTRACTORS STATE LICENSE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

In the Matter of the Accusation Against:

**ENERGY SERVICES PARTNERS, INC.
DBA ESP CONTRACTING, KENNETH
GARY GIETZ RMO/CEO/PRES,**

Contractor's License No. 619149,

Respondent.

CASE NO. N2017-309

OAH NO. 2018080633

DECISION AND ORDER

**RAYKER INC. DBA GREENSPIRE
CONSTRUCTION, KENNETH GARY
GIETZ, RMO; DAVID BRONSON
MURRAY, CEO/PRES; KENNETH JOHN
BIEHL, OFFICER,**

Contractor's License No. 1018241,

Affiliated Party,

**QUATIVA, INC., KENNETH GARY
GIETZ, CEO/PRESIDENT; DALLEN
GARY GIETZ, RMO,**

Contractor's License No. 1022887,

Affiliated Party.

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Registrar of Contractors as his Decision in the above-entitled matter, except that it is modified to **DELETE** the following from the ORDER:

7. Kenneth Gary Gietz is also required to take and pass a course in Contractors License Law or any course related to construction law at an accredit community college.

The failure to comply with the remaining provisions of the probation, will cause the probationary period to be extended, until said terms are complied with or the discipline is reimposed.

IT IS FURTHER ORDERED that **ENERGY SERVICES PARTNERS, INC. DBA ESP CONTRACTING**, License Number **619149**, on the effective date of this Decision shall have on file a Disciplinary Bond or post a cash deposit in the amount of \$30,000.00, for a period of not less than three years pursuant to Section 7071.8 of the Business and Professions Code. Any suspension for failing to post a disciplinary bond or a cash deposit, or any suspension for any other reason, shall not relieve the Respondent from complying with the terms and conditions of probation. Furthermore, suspension of the license during the period of probation, for any reason under this chapter, will cause the probationary period to be automatically extended in time equal to the length of time that the license is not in a clear and active status.

IT IS FURTHER ORDERED that respondent shall pay the investigative costs in the amount of \$8,561.67. Monthly payments are to be made in the amount of \$285.39, until completed. Payments are to be made at the end of each month, commencing the first full month after the effective date of this decision.

IT IS FURTHER ORDERED that respondent shall pay restitution amount of \$7,474.00. This amount is to be paid within 90 days of effective order.

IT IS THE responsibility of the respondents, named in this Decision, to read and follow the terms and conditions of the Order. The deadlines for meeting the terms and conditions are based upon the EFFECTIVE DATE of the Decision. No notices or reminders will be sent, as to the compliance of the terms and conditions. Proof of payments of restitution if ordered, and payments for the Cost of Investigation and Enforcement are to be sent to CSLB, Sacramento Case Management, Post Office Box 26888, Sacramento, CA 95826.

This Decision shall become effective on July 22, 2019.

IT IS SO ORDERED June 20, 2019.



David Fogt
Registrar of Contractors

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CONTRACTORS' STATE LICENSE BOARD
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Case No. N2017-309

OAH No. 2018080633

PROPOSED DECISION

This matter was heard by Nana Chin, Administrative Law Judge with the Office of Administrative Hearings, on February 5-7, 2019, in Los Angeles, California.

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Kevin J. Rigley, Deputy Attorney General, represented complainant, Wood Robinson, Enforcement Representative I of the Contractor's State License Board (Board or CSLB), Department of Consumer Affairs. Energy Service Partners Inc., dba ESP Contracting (respondent), Kenneth Gary Gietz, RMO/CEO/President, was represented by Seth Weinstein, Attorney at Law. No appearance was made on behalf of affiliated parties Rayker Inc. dba Greenspire Construction and Quativa, Inc.

Oral and documentary evidence was received. During the hearing, respondent stipulated to the third, fifth, seventh, and thirteenth causes of discipline in the Accusation.

Complainant requested that the Accusation be amended by interlineation. Because of the breadth of the proposed amendments, the ALJ directed complainant to file to file an Amended Accusation by March 7, 2019. Complainant filed the First Amended Accusation¹ on February 22, 2019. The document was marked as Exhibit 42 and admitted for jurisdictional purposes.

The ALJ also permitted submission of the Arizona police report regarding the investigation underlying the court records (respondent's Exhibit C) by March 7, 2019. Respondent submitted the report on February 21, 2019, and the ALJ marked it as respondent's Exhibit J. Complainant objected to admission of the report on the grounds that it was hearsay and irrelevant. Complainant's objection was marked as Complainant's Exhibit 42. Complainant's objection is overruled, and the document is admitted as administrative hearsay.

The record was closed, and the matter was submitted for decision on March 21, 2019. While reviewing complainant's Exhibit 29, the ALJ noted that portions of the document were not legible. The ALJ therefore reopened the record and ordered complainant to submit a legible copy of the document by April 29, 2019. Respondent was provided until May 2, 2019, to file any objections or response to the document offered by complainant. Complainant failed to comply with the order, and no legible copy of Exhibit 29 was produced.

On April 29, 2019, the record was reclosed and the matter resubmitted for decision.

SUMMARY

Complainant seeks to discipline respondent's contractor's license based on numerous violations of the Contractors' State License Law (Bus. & Prof. Code, § 7000, et seq.) (Act) in connection with two solar installation contracts. Complainant further alleges discipline should be imposed based on Mr. Gietz's failure to disclose the revocation of his Arizona contractor's license in his application to reactivate his California contractor's license.

¹ The third, fifth, seventh and thirteenth causes for discipline of the First Amended Accusation remain unchanged from the original Accusation.

Respondent did not dispute the violations in connection with one of the two contracts. Respondent submitted evidence of corrective changes that were implemented to avoid similar violations. As discussed below, cause exists to discipline respondent's license. To adequately protect the public, respondent shall be granted a probationary license.

FACTUAL FINDINGS

Parties and Jurisdiction

1a. On May 11, 1991, the Registrar of Contractors (Registrar) issued Contractor's License Number 619149, Classification B (General Building Contractor), to Gary Gietz Master Builder, solely owned by Kenneth Gary Gietz. The license expired on May 31, 2001. The license was reissued on September 29, 2012, under the business name Gary Gietz Contracting. On October 19, 2013, the license was suspended pursuant to Business and Professions Code section 996.340 (failure to maintain contractor's license bond). The suspension was subsequently lifted on November 12, 2013.² On July 3, 2015, the license was reactivated.

1b. On November 10, 2015, the license was reassigned to respondent, with Mr. Gietz listed as respondent's responsible managing officer (RMO). Respondent's contractor's license will expire on November 30, 2019, unless renewed. The license has no prior history of discipline.

2. On September 14, 2016, the Registrar issued Contractor's License Number 1018241, Classification B, to Rayker, Inc., doing business as Greenspire Construction (Rayker), with Mr. Gietz listed as the corporation's RMO. Classifications C-10 (Electrical-General) and C-46 (Solar) were added to the license on September 13, 2018. On August 27, 2018, Mr. Gietz was disassociated from the license. The license will expire on September 30, 2020, unless renewed. The license has no prior history of discipline

3. On January 24, 2017, the Registrar issued Contractor's License Number 1022887, Classification B, to Quativa, Inc. (Quativa), with Mr. Gietz listed as an officer. This license was in full force and effect at all times relevant to the charges brought and will expire on January 31, 2021, unless renewed. The license has no prior history of discipline.

4. On May 29, 2018, Complainant filed the Accusation while acting in his official capacity. Respondent timely filed a Notice of Defense.

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² When the license became inactive on November 12, 2013, the suspension was lifted as inactive licenses are not required to maintain a contractor's bond.

Marrilla Project

5. On November 7, 2016, Bobby Tetsch, an unregistered salesperson representing respondent, met with Maria Rodriguez at her home in Norwalk, California, to discuss the benefits of solar installation. As Ms. Rodriguez is primarily Spanish speaking, her daughter, Claudia Ruiz, was present at the meeting and provided translation. During the sales presentation, Mr. Tetsch asked to view Ms. Rodriguez's utility bills. After he reviewed her bills, he informed Ms. Rodriguez that she could have solar panels installed for less than her current utility payment of \$95.00 a month. The worksheet Mr. Tetsch provided Ms. Rodriguez showed that if she signed "today," the cost of the 25-year program would be \$21,075, with a fixed program payment of \$84.66 a month. (Exhibit 7.)

6. Ms. Rodriguez expressed to Mr. Tetsch that she was concerned about the condition of her roof as she had not replaced her roof during the approximately 20 years she had owned her home. Mr. Tetsch claimed that another benefit of the solar panels was that the panels would "protect the roof." (Exhibit 7.) He also assured Ms. Rodriguez that a licensed professional would inspect the condition of her roof and that the panels would not be installed unless it was determined that her roof was suitable for solar installation. Mr. Tetsch further assured Ms. Rodriguez that she had nine days to cancel the transaction. Based on these assurances, Ms. Rodriguez agreed to enter into the contract with respondent. Ms. Rodriguez electrically signed the agreement Mr. Tetsch presented to her on his laptop but was not provided a hard copy of the contract. Mr. Tetsch did, however, provide Ms. Rodriguez with a "Three-Day Right to Cancel" notice. The notice, however, was written in English.³

7. When Ms. Rodriguez subsequently received and reviewed the agreement, she discovered that the purchase price for the solar panel system was \$38,283, not the \$21,075, she was quoted. Ms. Rodriguez contacted respondent and spoke with Genesis Zorilla, who was able to communicate with respondent in Spanish, and verbally cancelled the contract.

8. As Ms. Rodriguez did not believe any inspection of her home had been scheduled,⁴ which she had been told was required before the solar installation could go forward, Ms. Rodriguez reasonably believed that the contract had been cancelled.

³ Contrary to the assertion by Enforcement Representative Nyssa Wilson, Business and Professions Code section 7159, subdivision (e)(6)(A), does not require respondent to provide Ms. Rodriguez with a copy of the "Three-Day Right to Cancel" notice in Spanish. The subdivision requires that the notice be written in the same language used in any oral sales presentation. As the presentation was conducted in English, the notice was not required to be written in Spanish.

⁴ Though respondent had records indicating an inspection of Ms. Rodriguez's home had been conducted, the individual who allegedly conducted the inspection, Octavio Rosales, is currently employed by respondent but did not testify at the hearing. "If weaker and less satisfactory evidence is offered when it was in the power of the party to produce stronger and

9. On December 20, 2016, respondent's workers came to Ms. Rodriguez's home to install the solar panels. Ms. Rodriguez objected to the installation, and the workers directed Ms. Rodriguez to their "boss," Jordan Gietz. Ms. Rodriguez called Mr. Jordan Gietz who transferred her call to Ms. Zorilla.

10. During the call, Ms. Zorilla told Ms. Rodriguez that if she did not permit the installation of the solar panels, she would have "terrible legal problems" and her home could be taken away. Ms. Rodriguez had lost her husband earlier that year, and her daughter, Ms. Ruiz, had recently been diagnosed with cancer. Ms. Rodriguez felt that she had to make sure nothing happened to her house and permitted the installation. Respondent's intimidation tactics convinced Ms. Rodriguez that she had no choice but to permit the installation.

11. Almost immediately after the installation, Ms. Rodriguez's roof began to leak. Ms. Rodriguez contacted respondent on December 23, 2017, and again spoke with Ms. Zorilla. When she reported the leak, Ms. Zorilla told her not to worry because respondent would send someone to repair the leaks.

12. Respondent sent Richard Alvarez, an unlicensed contractor, to Ms. Rodriguez's home the following day. Mr. Alvarez inspected the roof and charged Ms. Rodriguez \$1,800 to stop the leaking inside the home and another \$300 to stop the leaking in the attached laundry room. Mr. Alvarez indicated that he had done a "complete patch job throughout entire roof, caulk[ed] all areas, [and] re-seal[ed] all jacks and flashings." (Exhibit 9, AGO-0048.) Mr. Alvarez also assured Ms. Rodriguez that the cost of these repairs would be deducted from the amounts she owed respondent for the solar panels. Ms. Rodriguez later discovered that none of the work Mr. Alvarez claimed to have performed had been done and that he had merely placed a blue tarp on the roof. When Ms. Rodriguez contacted Mr. Alvarez, advising him that she needed a better solution than a blue tarp, Mr. Alvarez informed her she needed a new roof.

13. On December 29, 2017, representatives of the City of Norwalk (City) inspected the solar panels on the roof. Ms. Rodriguez received a correction notice listing the following deficiencies: "1) panels attached to roof improperly, direct penetration thru roofing membrane[;] 2) no labels or signs on conduits or panels missing[;] 3) electrical meter upgrade not ready[;] 4) existing roofing in poor condition unsuitable for P.V. array installation." (Exhibit 8.)

14. Following the City's inspection, Mr. Alvarez induced Ms. Rodriguez to enter into a contract to repair her roof by assuring her that respondent would reimburse her by taking the amount paid from what she owed for the solar installation. Though Ms. Rodriguez found this to be confusing, Ms. Rodriguez relied on Mr. Alvarez's assurances because the "boss," Mr. Jordan Gietz, was present during the discussion.

more satisfactory evidence, the evidence offered should be viewed with distrust." (Evid. Code, § 412.)

15. On January 6, 2017, the solar panels were removed so that the demolition could begin. Mr. Jordan Gietz arrived at Ms. Rodriguez's home with Mr. Alvarez and convinced Ms. Rodriguez to finance both the repair of the roof and the installation of solar panels through Solar Mosaic, Inc. (Mosaic). Mr. Jordan Gietz falsely told Ms. Rodriguez that adding the financing for the roof repair to her existing financing arrangement would cost her only \$20 more each month. As Ms. Rodriguez felt she had no other choice, she agreed. Mr. Jordan Gietz instructed Ms. Rodriguez to electronically sign the loan documents without reviewing their terms with her.

16. After Ms. Rodriguez reviewed the terms of the Mosaic contract, she noted that the terms of the contract were different from those presented by Mr. Jordan Gietz. Specifically, though Mr. Jordan Gietz told her that the loan would result in monthly payments of approximately \$105, \$20 more than the \$84.66 she had been quoted by Mr. Tetsch, the loan required Ms. Rodriguez to make 17 monthly payments of \$153.78, 281 monthly payments of \$219.77, and then a final payment of \$218.90. These monthly payments totaled \$64,589.40. Ms. Rodriguez sent a notarized cancellation of the finance contract with Mosaic two days later.

17. Respondent wrote Ms. Rodriguez, contending that their contract was binding and that Ms. Rodriguez would have to find a way to pay them. (Exhibit 16, AGO-0203.)

18. In the interim, respondent's representative, Mr. Alvarez, continued to perform work on Ms. Rodriguez's roof. Mr. Alvarez kept requesting payments while also assuring her that respondent would either reimburse her or deduct the amount from the money she owed. Ms. Rodriguez relied on these assurances because Mr. Jordan Gietz was often present at the jobsite while Mr. Alvarez did the roofing work.

19. In total, Ms. Rodriguez paid Mr. Alvarez \$22,700⁵ and respondent paid Mr. Alvarez \$7,200. After Ms. Rodriguez cancelled her Mosaic contract, Mr. Alvarez directed her to pay respondent the \$7,200 they had paid him. On January 11, 2017, Ms. Alvarez sent respondent a cashier's check for \$7,200.

20. Though respondent did not re-install the solar paneling, respondent filed a lien on March 17, 2017, for \$21,075, against respondent's home. On March 27, 2017, respondent filed a demand for arbitration, attaching respondent's purchase agreement for \$21,075, which was purportedly signed by Ms. Rodriguez on November 5, 2016. (Exhibit 14, AGO-0104-118.) This contract was different than the agreement respondent had provided Ms. Rodriguez, in that the earlier agreement indicated a purchase price of \$38,283. (Exhibit 6, AGO-0019-0028.)

21. On a date not determined by the record, an arbitration was held and an award was issued. Ms. Rodriguez did not appear at the arbitration because she was not notified of the hearing date. Ms. Rodriguez later entered into an agreement with respondent.

⁵ Ms. Rodriguez paid Mr. Alvarez \$22,400 in the form of checks and \$300 in cash.

Respondent re-installed the solar panels and repaired the stucco that had been damaged by respondent's workers. The installation was financed with a loan for \$24,000, with payments of \$105 a month. Respondent also paid Ms. Rodriguez \$2,000, and removed the mechanic's lien in exchange for her agreement to withdraw her complaint. Ms. Rodriguez testified that she was satisfied with the ultimate agreement.

Investigation into Marrilla Project

22. On January 17, 2016, Ms. Ruiz, submitted a complaint to the Board on behalf of her mother, Ms. Rodriguez. Following receipt of the Rodriguez's complaint, Nyssa Wilson was assigned to investigate the complaint.

23. At the time of the assignment, Ms. Wilson was an Enforcement Representative II for the Board. ER Wilson was part of the Solar Task Force, which was tasked to specifically investigate solar cases. Solar cases are specialized and more complicated as there are a number of facets to investigate, including the sales pitch, the purchase contract, the financing contract (if the job was contingent on the financing), the contracting process, and the quality of work performed.

24. As part of her investigation into the Marrilla Project, ER Wilson met with Mr. Gietz, Mr. Tetsch, and Ms. Zorilla, at the Norwalk Investigative Center on April 12, 2017.

a. During the interview, Mr. Gietz told ER Wilson that his son, Jordan Gietz, had been the project manager of the project, and Mr. Tetsch was the salesperson. Mr. Gietz acknowledged that Ms. Rodriguez had concerns regarding the suitability of the roof, which had been documented by Mr. Tetsch. Mr. Gietz asserted, however, that the computer logs indicate Octavio Rosales, one of respondent's employees, had inspected the Rodriguez roof and determined that it was fit for solar installation. Mr. Gietz acknowledged that Mr. Rosales was not licensed, and he was not familiar with Mr. Rosales's experience in roofing. Mr. Gietz also acknowledged that respondent sent Mr. Alvarez to the Rodriguez house to inspect the roof leaks. Mr. Gietz was not aware if Mr. Alvarez was licensed but was aware that his son had gone to the jobsite and spoke to Ms. Rodriguez with Mr. Alvarez. During the interview, it became clear that Mr. Gietz was unaware of much of what had transpired in connection with the Marrilla Project. At the close of the interview, Mr. Gietz advised ER Wilson that he would stop further arbitration proceedings until the Board completed its investigation.

b. Mr. Tetsch admitted that he was aware that Ms. Rodriguez was unable to read or understand English, which was why he had Ms. Ruiz translate for him. He also admitted that Ms. Rodriguez had communicated her concerns about the roof, and that he had assured her that an inspection would be performed prior to installation of the panels. Mr. Tetsch acknowledged that he may have stated that a "licensed professional" would conduct the inspection prior to the installation.

c. Ms. Zorilla reported to ER Wilson that Mr. Jordan Gietz had been the project manager for the Marrilla Project. Though Ms. Zorilla claimed she did not say respondent would take Ms. Rodriguez's home from her, she did admit that she told Ms. Rodriguez that respondent would place a lien on her home and that she was responsible for the loan. Though Ms. Zorilla claimed that Ms. Rodriguez's purchase contract for the solar panels was not contingent on financing, this statement is directly contradicted by Mr. Tetsch's notation on the "Three-Day Right to Cancel" notice that Ms. Rodriguez would be making monthly payments of \$84.66, which would result in Ms. Rodriguez's owning the system in 25 years. Ms. Zorilla also reported that respondent routinely uses Mr. Alvarez when there are roof issues.

25. The Board also retained Stanley Hadley to perform an inspection of the roof at the Rodriguez home. Mr. Hadley, a licensed contractor with 29 years' experience, inspected the Rodriguez roof on April 21, 2017, and prepared a report of his finding. The report, in conjunction with his testimony, credibly established that the value of the work performed on Ms. Rodriguez's roof was \$14,000. It was also established that the work performed by Mr. Alvarez departed from trade standards and that the cost to repair the defects would be \$275. The work that deviated from trade standards was as follows:

a. Contractor failed to use the correct size fasteners, and nails protruded through the underside of the perimeter sheathing.

b. Contractor failed to complete the painting of the pipe and vent flashings and fasteners along the ridgeline.

26a. Though it was established that the value of the work on Ms. Rodriguez's roof was \$14,000, the \$22,400 Ms. Rodriguez paid Mr. Alvarez also included work on Ms. Rodriguez's carport and attached laundry area. As there was no determination as to the value for the work performed on the carport and laundry area, clear and convincing evidence did not establish that the amount Ms. Rodriguez paid to Mr. Alvarez was unreasonable.

b. With respect to the \$7,200 Ms. Rodriguez paid respondent, respondent provided no explanation as to why respondent retained the funds.

c. Based on the evidence presented, clear and convincing evidence establishes that Ms. Rodriguez suffered financial injury in the amount of \$7,475 (\$7,200 paid to respondent on January 11, 2017 and \$275 for the cost to repair the defects.)

Village Road Project

27. The circumstances underlying the Village Road Project are significantly more confusing. Testimony provided by Robert Olds, the homeowner, contradicted both the information he provided to ER Wilson during the investigation and the documentary evidence submitted at the administrative hearing. In addition, respondent offered no witnesses with percipient knowledge of the project to testify at the hearing.

28. It was, however, established that on October 7, 2016, Trevor Rizzuto, an unregistered salesperson representing respondent, met with Robert Olds at his home in Lakewood, California, to discuss the benefits of solar installation. During the sales presentation, Mr. Rizzuto asked to view Mr. Olds utility bills. After reviewing his bill, Mr. Rizzuto advised Mr. Olds that his payments for solar energy would be approximately \$105 a month, a little more than his current electricity bill.

29. During the October 7, 2016 meeting with Mr. Rizzuto, Mr. Olds electronically signed both a purchase agreement and a financing agreement with Mosaic. A copy of the purchase agreement was sent to Mr. Olds in PDF form almost immediately afterwards. (Exhibit 26.) The fully executed Mosaic financing agreement was not sent to Mr. Olds until financing was approved.

30. On October 27, 2016, permits were issued for installation of the solar panels on Mr. Olds' roof. The permits were finalized on November 21, 2016. The evidence did not, however, establish the date when the installation took place.

31. The evidence demonstrated that Mr. Olds did not review the purchase agreement that had been emailed to him on October 7, 2016, until November 4, 2016. At that time, he noticed the first page of the purchase agreement states that the installation cost for the solar panel system was \$26,162. (Exhibit 25.) Mr. Olds reviewed the purchase agreement on November 16, 2016, November 21, 2016, November 22, 2016, and December 9, 2016

32. On November 11, 2016, Mosaic representative Anthony Bako signed the financing agreement and emailed a copy to Mr. Olds on the same date. There was no evidence regarding the dates on which Mr. Olds viewed the financing agreement.

33. The Mosaic financing agreement did not meet with Mr. Olds' approval, as he considered the terms in the agreement to be inconsistent with the information provided to him in his October 7, 2016 meeting with Mr. Rizzuto.

34. In December 2016, Mr. Olds contacted Mosaic to cancel the financing agreement. Mosaic sent two emails to Mr. Olds requesting confirmation of cancellation. The first was sent on December 19, 2016, the second was sent the following day on December 20, 2016. On December 20, 2016, more than a month after the Mosaic financing agreement was approved, Mr. Olds cancelled the Mosaic loan. Mosaic advised Mr. Olds that he would have to cancel the purchase loan with respondent separately.

35. On December 20, 2016, Mr. Olds forwarded the cancellation documents to respondent's representative, Dallen Gietz, by email. Mr. Dallen Gietz responded by email, stating that Mr. Olds' obligations under the purchase agreement remained unchanged. Mr. Dallen Gietz further noted that that Mr. Olds had failed to come to the meeting they had scheduled to address Mr. Olds' concerns and suggested scheduling another face-to-face meeting, providing him with the times that he would be available to meet with him. Mr.

Olds emailed back, stating that he would be open to meeting with Mr. Dallen Gietz, but he ultimately did not schedule a meeting.

36. On December 29, 2016, Mr. Olds unilaterally removed the solar panels, damaging them in the process, and left them on respondent's facility doorstep. Afterwards, Mr. Olds sent Mr. Dallen Gietz an email on December 29, 2016, claiming the panels had been delivered back "as requested by [respondent]." (Exhibit 29, AGO-0277.) Mr. Olds further stated that he had been ". . . lied to and deceived . . . I feel bad I deceived [*sic*] Trevor into believing I was the owner just because my uncle and I share the same name. It's a game I play that's got me in trouble before." (Exhibit 29, AGO-0277.) Mr. Olds acknowledged at the hearing, he had not been truthful in his email and that the home was not in his uncle's name.

37. Mr. Dallen Gietz responded to the December 29, 2016 email, advising Mr. Olds that a mechanic's lien had been filed on his home and arbitration had been requested. Mr. Dallen Gietz also advised Mr. Olds that he was still willing to meet with Mr. Olds in order to resolve the matter prior to arbitration. Mr. Olds subsequently sent an email to Mr. Dallen Gietz on January 11, 2017, stating, "Responding for R. Olds. The younger Olds is checked into a rehab facility for a 60 day stay. As a favor I will be checking his emails periodically but not daily. Any business should be scheduled on his return or I can get information on a lawyer set up by his family. Thank you" (Punctuation as in original.) (Exhibit 29, AGO-0287.) Mr. Olds admitted at hearing that he had been the one to send this email.

38. On March 15, 2017, an arbitration hearing was conducted. Mr. Olds did not attend. Approximately one half hour following the conclusion of the hearing, the arbitrator was notified by Business Consumer Alliance (BCA) that BCA had been contacted by Mr. Olds via email objecting to the proceedings. The arbitrator found in favor of respondent and issued an award of damages of \$26,162.

39a. Mr. Gietz met with Mr. Olds in order to resolve the matter. During the meeting, Mr. Gietz offered to settle all their legal issues, and Mr. Gietz and Mr. Olds negotiated an agreement where respondent would replace Mr. Olds' roof, insulate the attic, upgrade the main service panel and re-install solar paneling. The purchase agreement was to be financed through the County of Los Angeles's HERO Program (HERO). In addition, the settlement agreement required Mr. Olds to "change their 1 Star Yelp Review to a 5 Star Yelp Review & remove the BBB Complaint or any other consumer complaints." (Exhibit 33, AGO-0308.)

b. As Mr. Olds had a number of concerns related to the purchase agreement, he followed up with Mr. Gietz via email. In the email, Mr. Gietz confirmed that all new equipment would be used and that he would be absorbing the legal fees. There was no indication that these fees were being transferred to Mr. Olds.

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Investigation into Village Road Project

40. On December 29, 2016, the Board received a Complaint from Mr. Olds detailing his concerns regarding his November 7, 2016, contract⁶ with respondent. Mr. Olds indicated that the date of the contract was November 7, 2016, that the work began on November 3, 2016, and was completed on November 11, 2016.

41. ER Wilson was assigned the investigation of the complaint. On March 27, 2017, ER Wilson spoke with Mr. Olds over the phone. During the phone interview, Mr. Olds claimed that, during the sales pitch, Mr. Rizzuto had evaluated his energy bills and advised him that his payments would be a little more than what he was currently paying if he contracted for the solar panels. Mr. Olds stated that he was told by Mr. Rizzuto that installation would be free but that he would be paying approximately \$105 a month for the power. He claimed that he was also told by Mr. Rizzuto that, if he entered into the contract, Mr. Rizzuto would also include attic insulation and the installation of LED lights and that, after 25 years, Mr. Olds could eventually purchase the panels himself and not pay for just usage. Based on these assurances, Mr. Olds signed the contract electronically. Mr. Olds stated that he signed a form giving Mr. Rizzuto permission to run his credit information to see if he was eligible for a finance program. It was not until later that Mr. Olds found out that it was a credit application for Mosaic. When Mr. Olds finally opened an email with the link to the home improvement contract, he read that he was required to pay for installation of the solar panels and was very confused. On November 7, 2016, Mr. Olds received an email from Mosaic. Mr. Olds chose not to open the email for one week. Once he opened it, he realized that he would be paying much more than had been originally represented to him by Mr. Rizzuto. Mr. Olds tried contacting Mr. Rizzuto and when Mr. Rizzuto did not call him back, Mr. Olds cancelled the Mosaic finance contract "right away" by email. Mr. Olds reported that he then emailed respondent to remove the panels from his roof. After arguing with Mr. Dallen Gietz, Mr. Olds removed the panels himself and took them to respondent's office. Mr. Dallen Gietz emailed him, stating that he wanted to meet but Mr. Olds stated he declined to meet with them as he no longer trusted them.

42. Mr. Olds told ER Wilson that he had recently received papers for an arbitration hearing but that he had been unable to go and did not get the opportunity to represent himself at hearing.

43. On January 16, 2018, ER Wilson spoke with Mr. Olds, who provided her an update on his situation. According to Mr. Olds, he received a message from Mr. Gietz a few weeks back, stating that he wanted to make things right and asked him to come to his office. Mr. Olds went to his office and Mr. Gietz notified Mr. Olds that he was responsible for the \$26,162, judgment from the arbitration and for \$9,000, in attorney fees. Mr. Gietz proposed that he would absorb both costs if Mr. Olds would agree to installation of solar on his roof. When Mr. Olds expressed concerns about the condition of his roof, Mr. Gietz offered to have

⁶ This is presumably a typographical error. All the documents and Mr. Olds' testimony indicates that Mr. Olds signed the solar installation contract on October 7, 2016.

the roof inspected and provide an estimate for that to be replaced as well and add that to his proposal. In the end, the total proposed cost of the loan would be for \$47,100.

44. ER Wilson prepared a report of her investigation. In the report under "Complaint Facts," it states that the work began on October 27, 2016, and was last performed on November 21, 2016. (Exhibit 22, AGO-0232.) Also on the same page under "Note," it states, in part, that "[t]he solar panels were installed on the consumer's roof after October 27, 2016, and the job was completed before 11/7/16..." (Exhibit 22, AGO-0232.) There was no information provided as to how ER Wilson came to the conclusions regarding the date of the installation.

45. At hearing, Mr. Olds' testimony was markedly different from what he reported to ER Wilson. According to Mr. Olds, he did not realize he had entered into a binding contract during the October 7, 2016, meeting with Mr. Rizzuto. He believed he had signed a document to check his credit for approval of a loan and for smoke detector and carbon monoxide self-certification and that Mr. Rizzuto was supposed to return to discuss the terms with him. Mr. Olds testified that he did not believe he had DocuSigned either the purchase agreement or the Mosaic loan agreement. According to Mr. Olds, he only realized he had entered into a binding contract when the workers came to his home a few weeks later and began installing the solar panels on his roof. Mr. Olds testified that he tried to call Mr. Rizzuto right away but when he did not get back to him, he contacted Mr. Dallen Gietz.

46. Mr. Olds asserted a number of reasons why he did not appear at the arbitration hearing "I just felt like I wasn't going to win," he was acting as a foreman that day running a crew, he did not know the time of the hearing, only the date, and the arbitration was all the way in Colton.

47. After the arbitration, Mr. Olds met with Mr. Gietz. Mr. Gietz purportedly wanted him, in exchange, to remove all the negative Yelps and posts on social media. Mr. Gietz also asked Mr. Olds to sign a "completion of work," saying the job was complete so that respondent could be paid by HERO.

48. The solar panels were ultimately not reinstalled on Mr. Olds' roof. Respondent, however, did place insulation in Mr. Olds' attic and installed a new service panel. Mr. Olds has not paid respondent for any of the work that was performed but believes that respondent owes him restitution.

Application to CSLB

49. On August 16, 2012, Mr. Gietz submitted an application under the business name Gary Gietz Contracting for the reissuance of License Number 619149.

50. Question 12 of the application asks the following:

To the best of your knowledge, has anyone on this application (or any company the person is or was a part of, or any immediate family member of the applicant) ever received a citation from the [CSLB] or had a contractor license or other professional or vocational license or registration denied, suspended, or revoked by this state or elsewhere? (*Check "No" if the license was suspended due to lack of a bond, workers' compensation, a qualifier, or family support.*) (Italics in original.)

If you checked "Yes" for this question, you are required to attach a statement detailing the events leading to this action. (Italics in original.)

In response to Question 12, the initial application was checked "No." (Exhibit 16.)

51. On September 29, 2012, the Registrar reissued License Number 619149.

52. Mr. Gietz's response to Question 12 of this application was false and he knew it to be false.

53. On September 17, 1991, the Registrar of Contractors of the State of Arizona (Arizona Registrar) issued Arizona Contractor's License Number 091073, Classification B, to Gietz Master Builder ACC, a corporation (Gietz Master Builder). Mr. Gietz was the qualifying person and a corporate officer for Gietz Master Builder. On January 12, 2011, the license was revoked by the Arizona Registrar for failure to pay a civil penalty.

54. The circumstances underlying the revocation involve a contract Mr. Gietz, as Gietz Master Builder, entered into to construct a custom residence. In a decision following a June 22, 2010 hearing, Arizona Administrative Law Judge M. Douglas made a number of findings of fact, including: (1) Mr. Gietz entered into the contract while his license was under suspension for lack of a bond from June 29, 2009, to July 14, 2009; and (2) Mr. Gietz failed to complete construction work in a professional and workmanlike manner.

Evidence of Mitigation and Rehabilitation

55a. Mr. Gietz has been working in construction since 1978. In 1981, Mr. Gietz started The Building Company in Arizona, building custom homes. The company underwent two name changes, first to Gary Gietz Master Builder and later to Gietz Master Builder. Mr. Gietz obtained his California contractor's license in 1991 in order to build a home for a customer. The home was completed in 1992 or 1993.

b. During the start of the financial downturn in 2007, Mr. Gietz found himself in severe financial straits. As there were no funds, he was unable to pay his subcontractors. As a result, a couple he was building a custom home for and two subcontractors filed complaints

against Gietz Master Builder with the Registrar of Contractors of the State of Arizona (ROC). Gietz Master Builder was able to liquidate and eventually pay its subcontractors. Respondent is continuing to make payments to Arizona's Residential Contractors' Recovery Fund, from which the homeowners were paid \$30,000.

c. In 2011, Mr. Gietz decided to relocate to California to assist his son-in-law in his solar business, Green Monster. Green Monster later became One Energy which merged with Zero Energy. Mr. Gietz served as the responsible managing officer for Zero Energy.

56. Mr. Gietz expressed remorse for not disclosing the revocation of his Arizona license. Mr. Gietz had been concerned that California would not license him, and he needed a source of income. He realizes now that his omission of his revocation was a mistake, and he is willing to step down from his position as respondent's president and RMO if necessary.

57. Respondent currently operates out of a facility in Torrance, California, and employs 22 employees. Mr. Gietz estimated that, including independent contractors and subcontractors, approximately 100 households rely on respondent as a source of income.

58. Mr. Gietz estimates that less than 10 mechanics liens have been filed during the period in which respondent was providing solar installation systems.

59. Mr. Gietz expressed regret for the manner in which the Marrilla Project unfolded. Mr. Alvarez is no longer used by respondent in any manner. Mr. Gietz was unaware of the difficulties Ms. Rodriguez was facing until later. Mr. Gietz met with Ms. Rodriguez in an attempt to resolve the matter in way that would meet her satisfaction. In structuring the purchase agreement, he sought to make it so that her payments would be close to what she had been paying on her utility bill. In addition, he went the extra mile to paint the inside of her house, stucco the house, and he paid Ms. Rodriguez an extra \$2,000. Respondent's lien was removed sometime in the summer of 2018.

60. Mr. Gietz had no explanation for \$7,200 payment respondent made to Mr. Alvarez.

61. With respect to the Village Road Project, Mr. Gietz became aware his son, Mr. Dallen Gietz, was speaking to someone about work that had been done but who was unwilling to sign that the work was complete. Mr. Gietz subsequently came to the office and found the solar panels in front of the establishment.

62. The matter went to arbitration and respondent received a judgement against Mr. Olds. Afterwards, Mr. Gietz attempted to settle with Mr. Olds but he would not agree to sign the settlement agreement. Mr. Gietz estimates that respondent put approximately \$17,000 of hard costs into the Olds home, not including employee time.

63. Since the incidents involving Ms. Rodriguez and Mr. Olds, respondent has implemented a number of new procedures, including hiring "respectful and talented"

bilingual people and offering contracts written in Spanish. Respondent avoids sending salespeople to the elderly, and respondent will not execute contracts with senior citizens unless their children are present. Respondent also cancels contracts more readily. He stated "Anything marginal, we don't want it." Respondent also hired a controller to "avoid risk everywhere."

64. Mr. Gietz acknowledges that respondent's employees were "terrible" at having live conversations with homeowners, and has implemented a Quality Control Process policy that ensures each homeowner is now contacted multiple times during the process. After the contract has been signed, a welcome call is initiated and the project is reviewed with the customer. These calls are scripted and logged. During this call, sales support is to "[m]ake sure that client was not promised anything besides exactly what is on the Home Improvement Contract." (Exhibit D, p. 2.)

65. After the purchase agreement is signed, a site assessment is conducted. One of respondent's site inspectors takes between 20 and 30 pictures of the "indicators" on the homeowner's roof, which are then uploaded and sent to the engineering department to ensure that the homeowner's roof is suitable for solar installation. If the roof is not suitable for installation, homeowners are provided the option of purchasing a roof. If they chose not to install a new roof, respondent will not install the panels.

66. After activation of the solar panels, sales support calls the homeowner again and conducts a "Perfect 10 Survey" in order to assess customer experience.

67. Respondent also established the following: (1) Mr. Dallen Gietz has been removed from respondent's Articles of Incorporation, which was the basis for complainant's fifth cause for discipline; and (2) all home improvement salespeople selling respondent's products are listed on respondent's license, which was the basis for complainant's seventh and thirteenth causes for discipline. Respondent explained that prior to speaking with ER Wilson, he had not been aware of these California requirements.

68. Respondent presented testimony from Camille Gietz, Mr. Gietz's former wife, Rudy Rosales, a subcontractor who has performed work for respondent, Ross Jarvi, respondent's controller, and Carlos Garcia, respondent's quality control communication manager.

69a. Ms. Gietz had been married to Mr. Gietz for 35 years prior to their divorce in early 2015. Ms. Gietz was active in the operations of Gietz Master Builder. Ms. Gietz testified that Mr. Gietz was an honest and a man of integrity.

b. Ms. Gietz testified regarding the circumstances underlying the revocation of Gietz Master Builder's Arizona license. According to Ms. Gietz, the financial downturn in the economy dealt a "knock-out blow" to Gietz Master Builder. Everything came to a halt. Properties were listed but did not sell, loans were called due and they could not be paid. As this was happening, the company's comptroller disappeared without notice, and neither Mr.

Gietz nor Ms. Gietz were able to access the company's accounts and financial information. Once they were able to access the accounts, they found out that the company accounts were "dry."

c. Prior to these setbacks, the work performed by Gietz Master Builder was "flawless." After these financial setbacks, however, they were unable to pay their subcontractors, which resulted in the eventual discipline of their license.

70a. Mr. Rosales of Sunlight Installation and Maintenance testified on respondent's behalf. Mr. Rosales is a subcontractor who performs installation of solar panels for a number of different solar companies. According to Mr. Rosales, the installation process takes one to two business days. Mr. Rosales estimated that within the last 14 months, he has performed anywhere between 75 to 80 installations.

b. At the time of hearing, Mr. Rosales has known Mr. Gietz for approximately 18 months. Mr. Rosales spoke highly of respondent, and stated that he found the company to be ethical, to perform quality work and to be focused on customer care, "even in the back end."

71. Mr. Jarvi has known Mr. Gietz for approximately six years, having worked with him at Zero Energy. Mr. Jarvi was hired as the controller after the Rodriguez and Village Road Projects. According to Mr. Jarvi, Mr. Gietz is in the office daily and relies on him to "make sure everything is scrupulous." Prior to his hiring, respondent had an accountant but did not have a controller.

72a. At the time of hearing, Mr. Garcia has been employed by respondent as a quality control communication manager for homeowners for approximately seven months. In total, Mr. Garcia has been in the construction industry for seven years.

b. On a typical day, after the customer's right to rescind the contract has passed, members of respondent's sales support team contact each homeowner to discuss any issues related to financing and to advise the homeowners what to expect from site inspection to installation. If there is any hesitancy on the part of the homeowner, the installation is placed on hold and the sales representative is contacted. Respondent's quality control process policy, which was implemented prior to Mr. Garcia's employment, outlines the procedures that need to be followed by sales support.

c. Following the system activation, customers are sent a "Perfect 10 Survey," asking the customer to rate the service they had been provided on a scale from one to 10. The least acceptable number is a nine.

d. Mr. Garcia is familiar with the Marrilla Project as he had worked with Ms. Rodriguez to make sure she understood the terms of both the purchase contract and the financing contract.

e. Mr. Garcia testified that he believes that respondent runs a very ethical operation, stating that he has seen unethical behavior at other contracting companies “but not here.” Though he is aware of the allegations levied by CSLB, it did not change his opinion of respondent and Mr. Gietz.

Cost of Investigation and Enforcement

73. Pursuant to Business and Professions Code section 125.3, complainant has requested costs of investigation and enforcement in the total amount of \$15,473.73. This amount consists of costs incurred directly by the Board (\$2,811.23), as well as costs incurred by the Office of the Attorney General and billed to the Board (\$12,662.50). At hearing, complainant introduced, without objection, a Certification of Costs of Investigation and Prosecution in support of the investigation costs incurred directly by the Board (Exhibit 3). The Certification is divided into five categories – Cost of Investigative Services, Industry Expert Costs, Additional Consultant Services, Costs of Obtaining and/or Copying Records and Documents, and Attorney General Cost. The first category is further broken into subcategories for Consumer Services Representative and Enforcement Representative. Costs are sought only for Cost of Investigative Services and Industry Expert. With respect to the first category, the Board provided no information about the general tasks performed or the amount of time spent on each particular task. (Cal. Code Regs., tit. 1, § 1042, subd. (b)(1).) Similarly, there was no declaration or copies of time and billing records submitted for services provided by the Board’s expert, Mr. Hadley. (Cal. Code Regs., tit. 1, § 1042, subd. (b)(2).)

74. Complainant also introduced, without objection, a Certification of Prosecution Costs; Declaration of Kevin J. Rigley, which requests costs in the amount of \$12,842.50. Attached to the Certification is a printout of a Matter Time Activity by Professional Type, which describes tasks performed by the Office of the Attorney General in the amount of \$12,662.50. Considering the complexity of this matter, those costs are reasonable.

75. Respondent did not dispute its obligation to pay costs, and did not introduce any evidence of its inability to pay costs.

LEGAL CONCLUSIONS

Purpose of the Contractors’ License Law

1. The purpose of the Contractors’ License Law is to protect the public from incompetence and dishonesty in those who provide building and construction services. The licensing requirements provide minimal assurance that all persons offering such services have the requisite skill and character, understand applicable local laws and codes, and know the rudiments of administering a contracting business. (*Home Depot, U.S.A., Inc. v. Contractors’ State License Board* (1996) 41 Cal.App.4th 1592, 1597-1598.)

Standard of Proof

2. Under Business and Professions Code⁷ section 7090, where the registrar seeks to suspend or revoke a contractor's license, the registrar has the burden of proof to establish the cause for discipline by evidence that is clear and convincing. Clear and convincing evidence requires a finding of high probability, or evidence so clear as to leave no substantial doubt; the evidence should be sufficiently strong to command the unhesitating assent of every reasonable mind. (*Katie V. v. Superior Court* (2005) 130 Cal.App.4th 586, 594.) As set forth below, complainant established through clear and convincing evidence that discipline against respondent's license is warranted.

Cause for Discipline

3. First Cause for Discipline (Duty of Qualifying Individual on Behalf of Another). Cause exists under Business and Professions Code section 7068.1, to discipline respondent's license in that Mr. Gietz, as respondent's RMO, CEO, and president failed to exercise direct supervision and control of respondent's construction operations with respect to the Marrilla Project as set forth in Factual Finding 24.

4. Second Cause for Discipline (Departure from Trade Standards). As respondent's representative, respondent is held responsible for Mr. Alvarez's actions. A licensee may be subject to discipline by the licensing agency when its representative performs a licensed activity negligently or in violation of statutes. The licensee's liability for the conduct of its representatives is based on the theory that the licensee has a non-delegable duty of compliance. (*Rob-Mac, Inc. v. Department of Motor Vehicles* (1983) 148 Cal.App.3d 793, 799.) Cause exists under Business and Professions Code section 7109, subdivision (a), to discipline respondent's license in that Mr. Alvarez, a representative of respondent, performed roofing work on the Rodriguez home that deviated from accepted trade standards for good and workmanlike construction as set forth in Factual Finding 25.

5. Third Cause for Discipline (Omission of Misrepresentation of a Material Fact by an Applicant). Cause exists under Business and Professions Code section 7112, to discipline respondent's license in that respondent omitted the fact that his Arizona Contractor's License No. 091073 were revoked on January 12, 2011.

6. Fourth Cause for Discipline (Willful or Fraudulent Act). Cause exists under Business and Professions Code section 7116, to discipline respondent's license in that respondent committed willful or fraudulent act causing substantial injury to Ms. Rodriguez as set forth in Factual Findings 5 through 26.

7. Fifth Cause for Discipline (Working with Personnel Not on Record). Cause exists under Business and Professions Code section 7117, subdivision (b), to discipline

⁷ All further statutory references are to the Business and Professions Code.

respondent's license in that Dallen Gietz was listed on the Articles of Incorporation filed with the Secretary of State as the Secretary and Treasurer of respondent but was not listed on CSLB license information.

8. Sixth Cause for Discipline (Contracting with Unlicensed Contractor). Cause exists under Business and Professions Code section 7118, to discipline respondent's license in that respondent referred Mr. Alvarez, who was unlicensed, to Ms. Rodriguez to repair her roof as set forth in Factual Finding 12 through 19 and 24.

9. Seventh Cause for Discipline (Employed an Unregistered Salesperson). Cause exists under Business and Professions Code section 7154, to discipline respondent's license in that respondent used Mr. Tetsch, a home improvement salesperson who was not listed on respondent's license, to sell home improvement contracts.

10. Eighth Cause for Discipline (Payment Exceeds Value of Work Performed). Cause does not exist to discipline respondent's license under section 7159.5, subdivision (a)(5), in that complainant did not present any evidence that respondent either requested or accepted payment that exceeds the value of the work performed or the material used with respect to the Marrilla Project. (Factual Finding 26.)

11. Ninth Cause for Discipline (Misrepresentation in Obtaining Contract). Cause exists under section 7161, subdivision (b), to discipline respondent's license in that respondent's representatives made substantial misrepresentations to Ms. Rodriguez to induce her to enter into the contract as set forth in Factual Findings 5 through 26.

12. Tenth Cause for Discipline (Illegal Gag Order in Settlement Agreement). Cause exists under section 143.5, subdivision (a), to discipline respondent's license in that respondent included a provision in his proposed settlement agreement requiring Mr. Olds to remove all consumer complaints as set forth in Factual Finding 39.

13. Eleventh Cause for Discipline (Failed to Secure Financing Prior to Commencement of the Project). Cause does not exist section 7115 as that section interacts with section 7163, to discipline respondent's license in that complainant failed to establish that construction commenced on the Village Road Project prior to securing financing. The evidence did not establish the date the solar installation occurred at the residence or that the installation occurred before the homeowner's period to rescind the contract had elapsed, as set forth in Factual Findings 27, 29 through 30, 32, 40, and 44.

14. Twelfth Cause for Discipline (Subverting Investigation or Attempting to Subvert Investigation). Cause exists under section 7116.5, subdivision (a), to discipline respondent's license in that respondent engaged in conduct to subvert or attempt to subvert a CSLB investigation into the Village Road Project by proposing a settlement that would entail Mr. Olds withdrawing all consumer complaints as set forth in Factual Finding 39.

15. Thirteenth Cause for Discipline (Employment of Unregistered Home Improvement Salesperson). Cause exists under section 7154 to discipline respondent's license in that respondent used Mr. Rizzuto, an unregistered home improvement salesperson who was not listed on respondent's license, to sell home improvement contracts.

16. Fourteenth Cause for Discipline (Payment Exceeds Value of Work Performed). Cause does not exist under section 7159.5, subdivision (a)(5), to discipline respondent's license in that it was not established that respondent received and requested payments in excess of the value of the work performed on the Village Road Project. The evidence established that respondent performed work on Mr. Olds' home for which no payment was received. Complainant did not submit any evidence regarding what it believed to be the appropriate value of the work respondent proposed to undertake. Therefore, complainant failed to establish by a clear and convincing standard that the proposed contracts were excessive.

17. Fifteenth Cause for Discipline (Substantial Misrepresentation to Procure Contract). Cause does not exist to discipline respondent's license under section 7161, subdivision (b), in that complainant failed to establish that respondent represented to Mr. Olds that his payments would be \$105 per month or his payments would, in fact, be in excess of \$105 a month. Complainant further failed to establish that respondent told Mr. Olds that he would not be charged for installation of the solar panels.

18. Sixteenth Cause for Discipline (Fraud in Execution). Cause does not exist under section 7161, subdivision (c), to discipline respondent's license as the evidence did not establish that the \$47,100 loan would be for work that had previously been performed. The proposed contract with Mr. Olds required respondent to: (1) install insulation; (2) install a new service panel; (3) install solar panels; and (4) install a new roof.

19. Seventeenth Cause for Discipline (Preparing or Accepting Trust Deed as Obligation for Improvement Work). Cause does not exist under section 7161, subdivision (c), to discipline respondent's license as there was no evidence that respondent inflated the cost of the contract to Mr. Olds to include the \$26,000 arbitration award from the previous contract or that respondent ever admitted to having inflated the cost in that manner.

20. Eighteenth Cause for Discipline (Illegal Gag Order in Settlement Agreement). Cause exists under section 143.5, subdivision (a), to discipline respondent's license because respondent entered into a settlement agreement with Ms. Rodriguez that included a provision that she withdraw her complaint with the Board, as set forth in Factual Finding 21.

21. Nineteenth Cause for Discipline (Subverting Investigation or Attempting to Subvert Investigation). Cause exists under section 7116.5, subdivision (a), to discipline respondent's license because respondent entered into a settlement agreement with Ms. Rodriguez that included a provision that she withdraw her complaint with the Board as set forth in Factual Finding 21.

Appropriate Disciplinary Penalty

22. Pursuant to California Code of Regulations, title 16, section 871, the Board has adopted Disciplinary Guidelines (Rev. 12/11/16) (Guidelines). The Guidelines indicate that the appropriate minimum penalty for most of the violations identified in Legal Conclusions 3 through 9, 11 and 12, 14 and 15, and 20 and 21, is stayed revocation with a probation term of two to three years, with the maximum penalty being revocation of the contractor's license. The Guidelines further state that in determining whether revocation, suspension, or probation should be imposed in a given case, factors such as the nature and severity of the acts, the actual or potential harm to the public, the performance of work that was potentially hazardous to the health, safety or general welfare of the public, the prior disciplinary record, the number and/or variety of current violations, the mitigation evidence, and the rehabilitation evidence should be considered.

23. In this case, respondent's failure to comply with the Act in its dealings with Ms. Rodriguez and its attempt to subvert the Board's investigations by including a clause its settlement agreements cannot be condoned. Nor can Mr. Gietz's conduct in knowingly failing to disclose the revocation of his Arizona business license. On balance, however, respondent has been licensed in the state of California for more than 25 years and respondent has had no other citations or history of discipline. In addition, respondent implemented a number of changes to its business practices to ensure future violations such as those which occurred in the Marrilla Project do not recur. A number of individuals testified on respondent's behalf regarding the ethical nature in which respondent conducts business.

24. The primary objective of a disciplinary administrative proceeding is to protect the public, and not to punish a licensee. (*Camacho v. Youde* (1979) 95 Cal.App.3d 161, 164.) In issuing and disciplining a license, a state agency's primary concern is with protection of the public, maintaining the integrity and high standards of the profession, and preserving public confidence in licensure. (*Ibid*; see also *Fahmy v. Medical Bd. of California* (1995) 38 Cal.App.4th 810, 817.) The record supports the conclusion that revocation of respondent's license is not necessary at this time. Members of the public having contact with respondent in a professional capacity can be adequately protected by placing respondent on probation.

Restitution

25. Pursuant to Government Code section 11519, respondent may be ordered to pay restitution as a condition of probation. The evidence established that due to respondent's violations of the Act as it related to the Marilla Project, Ms. Rodriguez suffered financial injury in the amount of \$7,475.

Award of Costs

26. Business and Professions Code section 125.3 states, in pertinent part:

(a) Except as otherwise provided by law, in any order issued in resolution of a disciplinary proceeding before any board within the department or before the Osteopathic Medical Board, upon request of the entity bringing the proceeding, the administrative law judge may direct a licentiate found to have committed a violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.

[¶] ... [¶]

(c) A certified copy of the actual costs, or a good faith estimate of costs where actual costs are not available, signed by the entity bringing the proceeding or its designated representative shall be prima facie evidence of reasonable costs of investigation and prosecution of the case. The costs shall include the amount of investigative and enforcement costs up to the date of the hearing, including, but not limited to, charges imposed by the Attorney General....

27. California Code of Regulations, title 1, section 1042, subdivision (b), states the following about cost recovery:

Except as otherwise provided by law, proof of costs at the Hearing may be made by Declarations that contain specific and sufficient facts to support findings regarding actual costs incurred and the reasonableness of the costs, which shall be presented as follows:

(1) For services provided by a regular agency employee, the Declaration may be executed by the agency or its designee and shall describe the general tasks performed, the time spent on each task and the method of calculating the cost. For other costs, the bill, invoice or similar supporting document shall be attached to the Declaration.

(2) For services provided by persons who are not agency employees, the Declaration shall be executed by the person providing the service and describe the general tasks performed, the time spent on each task and the hourly rate or other compensation for the service. In lieu of this Declaration, the agency may attach to its Declaration copies of the time and billing records submitted by the service provider.

28. In *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the California Supreme Court set forth factors to be considered in determining the reasonableness of the costs sought pursuant to statutory provisions like Business and Professions Code section 125.3. These factors include: 1) the licentiate's success in getting the charges dismissed or reduced; 2) the licentiate's subjective good faith belief in the merits of his or her position; 3) whether the licentiate raised a colorable challenge to the proposed discipline; 4) the licentiate's financial ability to pay; and 5) whether the scope of the investigation was appropriate in light of the alleged misconduct. (*Id.*, at p. 45.)

29a. Though the Certification of Prosecution Costs; Declaration of Kevin J. Rigley, requesting costs in the amount of \$12,842.50, did have sufficient details to support his request for prosecution costs, complainant failed to establish the allegations regarding seven of the 18 causes of discipline, thereby reducing the reasonable costs of prosecution in this matter by a third.

b. As set forth in Factual Finding 75, complainant failed to present sufficient details to support his request for investigation costs incurred directly by the Board in the amount of \$2,811.23. (Cal. Code of Regs., tit. 1, § 1042, subd. (b)(1) and (2).)

c. The reasonable costs pursuant to Business and Professions Code section 125.3 therefore are \$8,561.67.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

Contractor's License Number 619149, issued to respondent, is revoked. However, the revocation is stayed, and respondent is placed on probation for three years on the following terms and conditions:

1. Obey All Laws: Respondent shall comply with all federal, state and local laws governing the activities of a licensed contractor in California.

2. Interviews with Regional Deputy: Respondent and any of respondent's personnel of record shall appear in person for interviews with the Regional Deputy or designee upon request and reasonable notice.

3. Violation of Probation: If respondent violates probation in any respect, the Registrar, after giving notice and opportunity to be heard, may revoke probation and impose the disciplinary order that was stayed. If the decision contains an order to make restitution, the Registrar may impose the disciplinary order without giving the respondent an opportunity to be heard should respondent fail to comply with the restitution order.

4. Respondent shall submit copies of documents, including contracts, directly related to respondent's construction operations to the Registrar upon demand during the probation period.

5. Within 90 days of the effective date of this Decision, respondent shall make payment of restitution and submit proof to the Registrar that restitution in the amount of \$7,474, has been made to Maria Rodriguez. Failure to pay restitution and/or to submit such proof of restitution shall automatically terminate the stay of the order of revocation, and respondent's license shall be revoked effective 90 days from the effective date of this Decision.

6. If not taken within the past 5 years, Kenneth Gary Gietz shall take and pass the CSLB law and business examination.

7. Kenneth Gary Gietz is also required to take and pass a course in Contractors License Law or any course related to construction law at an accredited community college. All courses must be approved in advance by the Registrar.

8. Other Licenses / Licensees.

a. The Registrar may suspend or revoke, without notice, any other license issued in the name of Kenneth Gary Gietz or for which Kenneth Gary Gietz furnished the experience and appearance.

b. Kenneth Gary Gietz is prohibited from serving as an officer, director, associate, partner, or qualifying individual of any other licensee during the period of probation, and any licensee which employs, elects, or associates him in any capacity other than as a non-supervising bona fide employee shall be subject to disciplinary action.

9. Respondent shall pay to the Contractors' State License Board costs associated with its investigation and enforcement pursuant to Business and Professions Code section 125.3 in the amount of \$8,561.67. Upon request, respondent shall be permitted to pay these costs in a payment plan approved by the Board, with payments to be completed no later than six months prior to the end of the probation term. Probation shall not terminate until full payment has been made. Should any part of cost recovery not be paid in accordance with the outlined payment schedule, respondent shall be considered to be in violation of probation. Any order for payment of cost recovery shall remain in effect whether or not probation is tolled.

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10. Completion of Probation: Upon successful completion of probation, the contractor's license will be fully restored.

DATED: June 3, 2019

DocuSigned by:
Nana Chin
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NANA CHIN
Administrative Law Judge
Office of Administrative Hearings